Beech & Rich, Inc. *and* International Brotherhood of Painters and Allied Trades, Local 759, AFL–CIO, and International Brotherhood of Painters and Allied Trades, Local 312, AFL–CIO. Case 7–CA–28670

December 13, 1990

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On August 21, 1989, Administrative Law Judge George F. McInerny issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed a brief in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs[1] and has decided to affirm the judge's rulings, findings,[2] and conclusions and to modify his recommended remedy.[3] We will also issue a new Order and notice that conform more closely to the violations found.

The judge found, and we agree, that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to pay contractually mandated fringe benefit contributions and by refusing to supply the Unions and the benefit funds with information necessary and relevant to Local 759's functions as the exclusive collective-bargaining representative of the unit employees.[4] The Respondent defends on the ground that, when its president, Jim Beech, and Local 759's then business representative David Clark entered into the written collective-bargaining agreement, they orally agreed that the written contract would ''not be fully effectuated.'' In this regard, the Respondent contends that Beech and Clark agreed that the contract would not be enforced regarding nonunion projects and customers that the Respondent had at the time the contract was entered into. Assuming arguendo, contrary to the judge's finding, that an oral agreement existed between Beech and Clark, we find that it could not be given effect. The alleged oral agreement would not merely explain or clarify the parties' intent regarding provisions of the collective-bargaining agreement but would instead invalidate and nullify the written agreement. In these circumstances, we conclude that the parties' written collective-bargaining agreement sets forth the terms and conditions of employment for the unit employees.[5]

ORDER

The National Labor Relations Board orders that the Respondent, Beech & Rich, Inc., Battle Creek and Plainwell, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing or refusing to give effect to and fully comply with its 1987–1989 collective-bargaining agreement and any successor agreements to which the Respondent may be bound with the International Brotherhood of Painters and Allied Trades, Local 759, AFL–CIO.

[1] The General Counsel has filed a motion to strike the Respondent's exceptions and brief on the grounds that they do not conform to the specificity requirements of Sec. 102.46 of the Board's Rules, and because the Respondent did not state concisely the grounds for the exceptions. We find that the Respondent's exceptions and brief substantially comply with the Board's Rules. Accordingly, the General Counsel's motion to strike the Respondent's exceptions and brief is denied. In considering the Respondent's brief in support of exceptions, however, we have not considered arguments or statements that are based on information that is not part of the record evidence in this case.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Based on certain remarks the judge made at the hearing, the Respondent has alleged bias on the part of the judge and has requested a new hearing. We have carefully examined the entire record, including the judge's decision. While we find that the judge made some intemperate remarks during the hearing, we are convinced that the judge did not prejudge the case, make prejudicial rulings, or demonstrate a bias against the Respondent in his analysis or discussion of the evidence. Further, there is no basis for finding that bias or partiality existed merely because the judge participated in the examination of witnesses and resolved important factual conflicts arising in the proceeding in favor of the General Counsel's witnesses. See *''M'' System*, 123 NLRB 1281 (1959). Indeed, it is the duty of the judge to inquire fully into the facts. He has the authority to call, examine, and cross-examine witnesses. See Sec. 102.35 of the Board's Rules and Regulations. Further, as the Supreme Court has stated, ''[T]otal rejection of an opposed view cannot of itself impugn the integrity or competence of a trier of fact.'' *NLRB v. Pittsburgh Steamship Co.*, 337 U.S. 656, 659 (1949). Accordingly, based on the foregoing, the Respondent's request for a new hearing is denied.

[3] We shall require that the Respondent shall make whole bargaining unit employees for any loss of wages or other benefits they may have suffered as a result of the Respondent's unfair labor practices as prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Because the provisions of employee benefit fund agreements are variable and complex, the Board does not provide at the adjudicatory stage of the proceeding for the addition of interest at a fixed rate on unlawfully withheld fund payments. Therefore, any additional amount owed with respect to the welfare funds and the pension fund will be determined in accordance with the procedure set forth in *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).

The Respondent will also reimburse its employees for any expenses ensuing from its failure to make contributions to the funds established by the collective-bargaining agreement between Local 759 and the Respondent. *Kraft Plumbing*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981).

[4] The Respondent's exceptions do not attack the judge's implicit finding that Local 312 and the benefit funds were agents of Local 759 for the purpose of requesting and receiving information relevant to administering the collective-bargaining agreement between the Respondent and Local 759.

[5] We find that the contract between the Respondent and Local 759 was an 8(f) agreement. The agreement was to expire in June 1989, which was after the hearing in this case. Although *John Deklewa & Sons*, 282 NLRB 1375 (1987), enfd. 843 F.2d 770 (3d Cir. 1988), permits a party to repudiate its 8(f) relationship on the expiration of a bargaining agreement, there is no evidence that the Respondent effectively repudiated its relationship or agreement with the Local 759. Accordingly, we leave to compliance the determination of whether the Respondent is bound to any subsequent or successor agreements under the principles of *Deklewa*. See *Estrella Construction Co.*, 288 NLRB 1049 (1988).

(b) Failing or refusing to contribute to the fringe benefit funds as mandated by the 1987–1989 collective-bargaining agreement between the Respondent and Local 759 and any successor agreements to which the Respondent may be bound, and refusing to allow audits as requested by the trustees of the fringe benefit funds.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make employees whole with interest for any wages and benefits they may have lost and expenses they may have incurred as a result of the Respondent's failure to abide by the collective-bargaining agreement with Local 759 which expired in June 1989, and any successor agreements to which the Respondent may be bound, and make all benefit fund payments owed to the various benefit funds as required by those agreements.

(b) Allow an audit of all payroll books and records as requested by the trustees of the Unions' benefit funds.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facilities in Battle Creek and Plainwell, Michigan, copies of the attached notice marked ''Appendix.''[6] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail or refuse to give effect to and fully comply with our 1987–1989 collective-bargaining agreement with the International Brotherhood of Painters and Allied Trades, Local 759, AFL–CIO, and any successor agreements to which we may be bound.

WE WILL NOT fail or refuse to contribute to the Unions' fringe benefit funds as mandated by the 1987–1989 collective-bargaining agreement and any successor agreements to which we may be bound.

WE WILL NOT fail or refuse to allow audits as requested, pursuant to the 1987–1989 collective-bargaining agreement, by the trustees of the Unions' fringe benefit funds.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL make employees whole with interest for any wages and benefits they may have lost and expenses they may have incurred as a result of our failure to abide by the collective-bargaining agreement with Local 759 which expired in June 1989, and any successor agreements, to which we may be bound, and make all benefit fund payments owed to the various benefit funds as required by those agreements.

WE WILL, on request, permit the trustees of the Unions' benefit funds to audit our payroll books and records.

BEECH & RICH, INC.

Richard F. Czubaj, Esq., for the General Counsel.
George J. Brannick, Esq. (Brannick & Dudus), of Jackson, Michigan, for the Respondent.

DECISION

GEORGE F. MCINERNY, Administrative Law Judge. Based on a charge filed on November 23, 1988, and amended on January 6, 1989, by International Brotherhood of Painters and Allied Trades, Local 759, AFL–CIO (Local 759), the Regional Director for Region 7 of the National Labor Relations Board (the Board) issued a complaint on January 10, 1989, alleging that Beech & Rich, Inc. (the Respondent) had violated and continued to violate provisions of the National Labor Relations Act (the Act). The Respondent filed a timely answer in which it denied the commission of any unfair labor practices.

Pursuant to the notice contained in the complaint, a hearing was held before me in Marshall, Michigan, on March 29,

1989, at which the General Counsel and the Respondent were represented by counsel, and had the opportunity to present testimony and documentary evidence, to examine and cross-examine witnesses, to make motions and statements in support of opposed to motions, and to argue orally. After the close of the hearing, the General Counsel and the Respondent filed briefs, which have been carefully considered.

Based on the entire record and particularly on my evaluations of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

The parties agreed that Respondent is a Michigan corporation, having its usual place of business in Battle Creek, where it is engaged in the business of commercial and industrial painting and related services. During the calendar year ending December 31, 1988, the Respondent performed services valued in excess of $50,000 for customers located in the State of Michigan, including the Kellogg Company and Simpson Plainwell Paper Company, each of which has gross revenues of over $500,000, and which annually purchase from locations outside the State products and materials valued in excess of $50,000 from points located outside of the State. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATIONS INVOLVED

The parties agreed at the hearing that Locals 759 and 312 are labor organizations within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

Jim Beech, president of Beech & Rich, Inc., testified that he had been running the Company since 1970. At one time he had been a member of Local 759, and served his apprenticeship in the trade through that Local. The Company does outside commercial painting and maintains a production painting facility in its Battle Creek plant.

Beech's demeanor was shifting and evasive and he seemed to have, either intentionally or unintentionally, very little memory about events which are critical to this case. For example, he did not recall whether a document bearing his signature and dated October 7, 1986, was the signatory page to a collective-bargaining agreement; and he would not, or could not, identify his signature on a document dated June 17, 1987. He could not identify payroll documents which he submitted to Simpson Plainwell Paper Company in August 1988, and he tried to disclaim responsibility for his ignorance of company matters by saying, ''I don't handle the paperwork'' or ''I don't have this part of it.''

For these reasons, I do not credit Beech's testimony on any significant matter except where that testimony is independently corroborated.

In the fall of 1987, one David Clark, who became a member of Local 759 in 1985, and by 1986 was a business representative for that Local, testified that he attempted to negotiate an agreement with Beech & Rich, and that he did negotiate a first agreement on October 7, 1986, and a second on June 17, 1987.[1]

Clark and Jim Beech apparently reached some sort of agreement, although I do not accept the word of either that this collective-bargaining agreement was just a trial of unionization and that Beech would ''try to go do the best of his ability to go strictly union on his work that he had'' 2 years after the signing of the 1987 contract.

I don't know what these two people were up to, and I really cannot speculate as to the cause of Respondent's signing this document with no intention of honoring it. Certainly the fact that Clark resigned as business representative for Local 759 in April 1988, and went to work for Beech & Rich in June of that year could be a reason for the bargain Clark made with Beech, but that is only a suspicion.

Consistently with my credibility findings on Jim Beech and David Clark, I cannot believe the testimony of either Beech or Clark that there were exceptions and variances to the unit description in the contracts, or that a waiver by a duly authorized representative of the Union was granted. There are, therefore, no questions as to application of the parol evidence rule as maintained by the parties,[2] or any question about the meeting of the minds of these parties before the agreements were signed.

The evidence which the General Counsel has produced, then, are the two signed agreements, which I find to be valid, binding, contracts, the second of which, dated June 17, 1987, was to remain in effect until June 1989. This last is an agreement alleged in the complaint to be one entered into under Section 8(f) of the Act, but no recession by the employer could be effective until the expiration of the agreement. *John Deklewa & Sons, Inc*., 282 NLRB 1375, 1389 (1987).

Having established the existence of the June 17, 1987 agreement, I next turn to the specific allegations of the complaint.

Ricky L. Root, business representative for Local 312, Kalamazoo, Michigan, testified that he and Clark's successor as business representative for Local 759, Tony Zugel, had a meeting on August 15, 1988, with Jim Beech, Helen Rover, and Don (or Bill) King, representing Beech & Rich. Root had been out on a job at the Simpson Paper mill in Plainwell, Michigan, a little north of Kalamazoo, and in the jurisdiction of Local 312. He found that Respondent was on the job, and his conversations with employees had alerted him to the possibility of contract violations on that job by the Respondent. Beech admitted that there were nonunion workers on the job, but said that he understood that as long as he didn't have union workers on that project he wasn't in violation of any agreement.[3]

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[1] I have a problem with Clark's credibility as well as Beech's. His memory on dates was not good; he gave no indication of why or under what circumstances he approached Beech & Rich; and he gave no reason why he permitted Beech & Rich to sign a contract which mandated certain coverage and obligation, and at the same time said to Beech that he did not have to live up to those provisions. I do not credit this witness on items which are critical to this case.

[2] Nor any question of fraud or wrongdoing by either party, even though there certainly are grounds for suspicion that some such considerations were present here (see *NDK Corp*., 278 NLRB 1035 (1986)), but no probative evidence beyond disbelief of the stories that were told by Clark and Beech.

[3] Beech further told Root and Zugel that the only reason he had union workers on the Simpson job was that work was slow at Kellogg (in Battle Creek) where ''he usually uses these union workers'' and he temporarily shifted the union people up to Simpson until things picked up at Kellogg. This could be

Root asked Beech for the names of the people employed, for either more or less than 8 days, on the Simpson job, in compliance with the appreciable Local 759 contract.

A second meeting took place between the same people on August 24. Root gave Beech some names of people he had talked to on the jobsite, but Beech refused to acknowledge that they worked for Respondent, nor would Beech say that he was aware that these employees were to be included under the labor contract.[4]

After these meetings there were a couple of letters from Zugel to Respondent requesting information on workers employed by Respondent, a letter from a lawyer representing Local 312 and its fringe benefit plans requesting compliance with the contract, and threatening action under the Federal ERISA statute.[5]

After these letters were sent, an auditor named Robert R. McGowan was hired by the lawyer for Local 312 to look into Respondent's records of employees who worked on the Simpson job. McGowan made arrangements to visit Respondent's offices on January 20, 1989. When he asked for the records of all the Simpson job workers, Beech told him to call Respondent's counsel, George J. Brannick. After this conversation, McGowan was allowed to see only records of five alleged ''Union employees'' on the Simpson job.

A second accountant, Marie Dowd, was engaged by the Painters National Pension Fund to audit the books of Beech & Rich. She also was referred to Brannick. After some delay she made arrangements through Brannick, but the scheduled day of her visit to the Company was the same day as she testified at this hearing. So what her experiences were from that point forward we do not know. It is obvious that the information requested of Respondent, and sought by Zugel and Root, and by these auditors, is necessary for the proper administration by the Unions, and the appropriate funds, of the collective-bargaining agreement between Respondent and Local 759.

There are no issues of fact regarding the meetings between Root and Zugel and Respondent, nor about the letters written by Zugel and Local 312's lawyer, nor about the experiences of the two accountants.

I, therefore, find that the Respondent has failed and refused to abide by the terms of what I have found to be a lawful collective-bargaining agreement.

The Respondent has failed and refused to make various fringe benefit contributions since August 1988,[6] to unit employees employed on the Simpson Paper Company Plainwell job.

The Respondent further, has failed to make contractually obligated contributions to pension, insurance, vacations, and holidays on account of unit employees.

The Respondent has failed and refused to supply requested information to the Unions, and to the various funds necessary for the administration of the collective-bargaining agreement between Respondent and Local 759.

Each of these failures and refusals I find to violate Section 8(a)(1) and (5) of the Act. *NDK Corp*., supra.

IV. THE REMEDY

Having found that Respondent has violated Section 8(a)(1) and (5) of the Act, I shall order it to cease and desist therefrom, and to take the following affirmative action designed to effectuate the policies of the Act.

I shall order that the Respondent permit full and complete examination of its books and records by auditors duly appointed by pension or health and welfare funds authorized to receive payments under the collective-bargaining agreement between the Union and Respondent effective June 2, 1987. On determination by such auditors that certain moneys are due, and on approval of such by Region 7 of the Board, I order that those moneys be paid to the respective funds.

CONCLUSIONS OF LAW

1. The Respondent, Beech & Rich, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 759 and Local 312 are labor organizations within the meaning of Section 2(5) of the Act.

3. The Respondent has violated Section 8(a)(1) and (5) of the Act by refusing to pay contractually obligated contributions due under its contract with the Union, and has refused to give information necessary for the Unions to administer that contract.

[Recommended Order omitted from publication.]

one explanation for the deal between Clark and Beech. Possibly Kellogg required union painters in its plant, and the only way Beech could do this was to sign up with Local 759, the Battle Creek local. This is educated speculation, based on experience, but still speculation, so no such finding in this can be made.

[4] As a result of these meetings, and a telephone conversation between Root and Helen Rover, of Beech's office, Root agreed not to ''harass'' workers at Simpson, and not to picket, if Beech & Rich would forward checked-off dues for union members who worked on the project. This did not affect the other matters under discussion.

[5] Apparently some sort of action was filed in the United States District Court for the Eastern District of Michigan, but nothing definite on that matter was forthcoming for the record in this case.

[6] This date, and the amounts due and the identification of specific funds to be paid will have to be determined at the compliance stage of these proceedings because there is no way of knowing the numbers of employees involved, the amounts due on account of each employee, and the total amounts due employees and the several funds involved.